Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

BETTY SPAHN, *Guardian of Edna M. Folz,*

Petitioner,

vs.

MARK WITTMAN, *Guardian ad Litem for Edna M. Folz,* and HOWARD B. EISENBERG, *Respondent-Designate,*

Respondents.

On Petition For Writ Of Certiorari To The Wisconsin Supreme Court

BRIEF IN OPPOSITION OF RESPONDENT-DESIGNATE

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PARTIES TO THE PROCEEDING

The Petition does not accurately reflect all of the parties to the proceedings in the Wisconsin Supreme Court as required by United States Supreme Court Rule 11.6.

After the case was briefed by the Guardian, Guardian *ad Litem*, and two friends of the Court, the Wisconsin Supreme Court ascertained that both parties and both *amici* were urging the Court to reverse the order of the trial court and allow the Guardian to withdraw the feeding tube from the disabled person. Thereafter, on September 19, 1996, the Wisconsin Supreme Court appointed Howard B. Eisenberg "Respondent-Designate" to argue in support of the Circuit Court's order. The Court subsequently granted the Respondent-Designate's motion to realign the parties to make both the Guardian and Guardian *ad Litem* parties-appellant, and the Respondent-Designate the only appellee before the Wisconsin Supreme Court.

Upon motion of the Respondent-Designate, this Court has corrected the caption of this case to reflect the proper parties.

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INTEREST OF RESPONDENT-DESIGNATE

This case was originally set for argument in the Wisconsin Supreme Court on October 17, 1996. However, when that Court determined that both of the parties and both *amici* were urging reversal of the Circuit Court's order and supporting the Guardian's request to allow Ms. Folz to die, on September 19, 1996 the State Supreme Court removed the case from the October oral argument docket, appointed the undersigned as Respondent-Designate, and ordered him to argue in support of the Circuit Court's order.[1] (*See*, Page 36a of the Appendix to the Petition for Writ of Certiorari filed herein). On November 20, 1996 the Wisconsin Supreme Court granted Respondent-Designate's motion to realign the parties to make both the Guardian and Guardian *Ad Litem* parties-appellant and to make him the only respondent in the Wisconsin Supreme Court. (*See*, Page 35a of the Appendix to the Petition for Writ of Certiorari filed herein). Respondent-Designate's interest is assuring that there is a party before the Court who advocates for the decisions of the Wisconsin courts which have refused to allow the Petitioner to withdraw the feeding tube and cause Ms. Folz's death.

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[1] Respondent-Designate is Dean and Professor of Law at Marquette University Law School in Milwaukee, Wisconsin. However, he is appointed in his individual capacity as a member of the Bar, and not in his capacity as Dean, to act as Respondent-Designate. The positions advocated in this brief do not necessarily reflect the position of Marquette University or any of the religious organizations affiliated with Marquette.

STATEMENT OF FACTS

Respondent believes that the following facts are important to this Court's disposition of the instant petition:

- Ms. Folz is not in a persistent vegetative state. Presently she is able to follow movement in the room, she may respond to tactile stimulation or voice by opening her eyes (T. 25)[2], and she will react to a modest level of physical stimulation (T. 25-26).
- Ms. Folz is not now experiencing pain (T. 34).
- Petitioner proposes to remove Ms. Folz' feeding tube, but continue to provide Ms. Folz with hydration.
- Allowing Ms. Folz to starve to death, while continuing to provide her with hydration, will cause her pain and discomfort.
- Ms. Folz has not executed an advance health care directive.
- The state courts made a factual determination that there is no evidence that Ms. Folz ever expressed an opinion of whether she would want to have her life terminated or sustained under the present circumstances.
- The Roman Catholic Church, of which Ms. Folz is a devout member, forbids removal of nutrition under these circumstances.

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[2] The "T" numbers in this brief refer to the pages in the trial transcript of the March 22, 1995 proceedings which is Document 19 in the Record on Appeal.

ARGUMENT

I

THE CONSTITUTIONAL ISSUES RAISED IN THE PETITION WERE NEITHER "PRESSED NOR PASSED UPON" BY THE WISCONSIN SUPREME COURT.

It is the practice of this Court, "when reviewing decisions by state courts, not to decide federal claims that were not 'pressed or passed upon' below." *Clark v. Jeter*, 486 U.S. 456, 460 (1988); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79-80 (1988).

The issues raised in the Petition were presented to neither the Circuit Court of Wood County, Wisconsin nor the Wisconsin Supreme Court, and neither Court decided the issues now raised. For this reason alone, the instant Petition should be denied.

The Wisconsin Supreme Court decided this case as a matter of state law, and did not decide any Constitutional issue. While this is clear from reading Justice Steinmetz's opinion for the Court, it is made even clearer by reading the two concurring opinions, one by Chief Justice Abrahamson (joined by Justices Geske and Bradley), *See Appendix to Petition*, pp. 18a-21a, and the other by Justice Bablitch, *See Appendix to Petition*, p. 27a. Although the Court unanimously decided that on this record, in this case, no Constitutional issues were raised, the concurring Justices staked out positions on Constitutional issues *not* necessary for the decision in this case.

Moreover, neither the pleadings nor briefs submitted in the state courts by Petitioner or the Guardian *ad Litem* raised the Constitutional claims now advanced. No party

to this case has ever previously raised any Equal Protection claim, and the issue specified in Argument "II" of the Petition is raised here in the first instance.

If there was a Constitutional issue raised by the Petitioner in the state courts – and it is not at all clear that any such issue was raised – it was a different issue than is raised here. In the state court the Petitioner suggested that the guardian could exercise the patient's Constitutional right to refuse treatment, *if the guardian could show that the patient herself would have refused treatment under those circumstances.* This is the issue addressed in the trial court brief which is quoted in truncated form at page 51a of the Appendix to the Petition. The problem with this argument was that the state trial court made a factual decision that the evidence did not support the conclusion that Ms. Folz would have made this decision if she was competent. On appeal, the Wisconsin Supreme Court explicitly upheld the factual determination that the evidence *failed* to show that Edna Folz would have wanted to withdraw the feeding tube under these circumstances, *see Appendix to Petition*, pp. 11a-12a.

No party before the Wisconsin Supreme Court suggested, as does Petitioner here, that some provision of the United States Constitution requires that the Guardian have the ability to subjectively decide that the quality of her ward's life had so badly deteriorated that the time had come to cause the disabled person to starve to death. This is an interesting issue, but it is not an issue presented by this case.

No petition for rehearing was filed in the Wisconsin Supreme Court, even though Petitioner tells this Court

that the issues she wants to raise are of "wrenching urgency," *Petition*, at 10. If the issues are so important, they should have been presented to the state court in the first instance. It is unfair to the Wisconsin Supreme Court to raise in this Court issues never presented at the state level.

The Petition should be denied on this basis.

II

NOTHING IN THE CONSTITUTION REQUIRES THAT EVERY STATE ADOPTS THE SAME LEGAL REQUIREMENTS FOR THE DECIDING END-OF-LIFE ISSUES, AND THE MANNER IN WHICH WISCONSIN HAS DEALT WITH THIS ISSUE IS RATIONAL AND, THUS, CONSTITUTIONAL.

A. There Is No Constitutional Requirement That Every State Adopt the Same Law Relating to End-of-Life Issues.

In Argument "I" Petitioner asserts that the decision of the Wisconsin Supreme Court in this case is at odds with decisions "of other state supreme courts and with various state statutes." Respondent demurs to this assertion. Assuming *arguendo* that the assertion is true,[3] that

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[3] However, Respondent is aware of no authority which would allow a Guardian, under the guise of "best interests," to cause suffering to, and the eventual death of, a disabled ward who is not in pain. That is precisely what the Petitioner here proposes to do. Contrary to the assertion of Petitioner, the facts in this case are quite different than in the many cases cited in the Petition, as here the disabled person is not in a persistent vegetative state, and the ward is not now suffering pain or discomfort.

does not give rise to any federal, much less Constitutional, issue. Respondent has studied this part of the Petition carefully, and he fails to find any federal claim even raised, much less a showing that some important Constitutional claim is presented that warrants this Court's plenary consideration.

The short answer to the Petition is that there is no Constitutional requirement that Wisconsin follow the law of any other state when deciding the issues raised by this case. If the Wisconsin Legislature and Wisconsin Supreme Court want to reject the "best interests" approach, they are perfectly within their rights to do so, and nothing in the United States Constitution requires to the contrary.

Petitioner points out that the Maryland and Oregon legislatures have adopted statutes which are inconsistent with how the Wisconsin Supreme Court has interpreted Wisconsin law, and that other state courts around the country have dealt with end-of-life issues differently than did Wisconsin's Highest Court. Such an argument is irrelevant to a grant of certiorari. These are issues of state law, decided by state courts and state legislatures. State probate codes and procedures are not matters of federal law.

The way in which the Wisconsin Supreme Court has decided to deal with surrogate decision-making may be unwise. Indeed, Chief Justice Abrahamson and Justices Geske and Bradley have suggested that in the appropriate case they would reconsider the standard to be applied, *see, Appendix to Petition*, pp. 18a-19a (Abrahamson, C.J., *concurring)*. However, it is not for this Court to decide whether Wisconsin law is wise or desirable, but only whether the decision of the Wisconsin Supreme Court

gives rise to any Constitutional question, *cf. Bowers v. Hardwick*, 478 U.S. 186, 190 (1986). Irrespective of what this Court may believe is wise or prudent policy in this area, "the Constitution does not constitute [this Court] as 'Platonic Guardians' nor does it vest in this Court the authority to strike down laws because they do not meet [the Court's] standards of desirable social policy, 'wisdom,' or 'common sense.' " *Plyler v. Doe*, 457 U.S. 202, 242 (1982) (Burger, C.J., dissenting).

The fact that Wisconsin law is different than that of other states gives rise to no federal issue.

B. In Any Event, Wisconsin Law Is Rational and Constitutional.

Conspicuously missing from the Petition is any mention of this Court's most recent statements in this area. During the last week of the last term, this Court decided two "doctor assisted suicide" cases, *Washington v. Glucksberg*, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) and *Vacco v. Quill*, 117 S.Ct. 2293, 138 L.Ed.2d 834 (1997). Surprisingly, neither of these cases is cited anywhere in the Petition.

These cases teach that a state law concerning end-of-life issues, when attacked on either Due Process or Equal Protection grounds, will be upheld if rationally related to a legitimate state interest, *Glucksberg*, 117 S.Ct. at 2271 (Due Process); *Vacco*, 117 S.Ct. at 2297 (Equal Protection). Here Wisconsin's rejection of the "best interests" approach in this case is undoubtedly rationally related to a valid state interest. In footnote 8 of the decision in this case, reprinted at pages 10a and 11a of the Petition, Justice Steinmetz articulated the State's interest: "These

are 1) preserving life, 2) safeguarding the integrity of the medical profession, 3) preventing suicide, and 4) protecting innocent third parties. Preserving life is the most significant state interest at issue here." (*Internal citation omitted*).

The Court went on to explain why the "best interests" approach, while followed in Wisconsin in many situations, is not appropriate when the issue is withdrawing nutrition or hydration.

> [M]ost determinations made in the best interests of a child or an incompetent person are not irreversible; and although a wrong decision may be damaging indeed, there is an opportunity for a certain amount of empiricism in the correction of errors of discretion. Errors of judgment or revisions of decisions by courts and social workers can, in part at least, be rectified when new facts or second thoughts prevail. . . . the decision to withdraw life-sustaining medical treatment is . . . not reversible, because death is not reversible. It is for this reason, then, that we require a guardian to show a clear statement of the ward's desires by a preponderance of the evidence.

Petition, at 11a.

To the best of her doctor's knowledge, Edna Folz is not now suffering pain (T. 34). The Guardian proposes to withdraw the feeding tube, while continuing to provide Ms. Folz with hydration. This will *cause* Ms. Folz suffering. Indeed, her doctor testified that he would give her pain medication should nutrition be withdrawn (T.46). One of the reasons the Wisconsin Supreme Court rejected the Petitioner's request to allow her ward to die was that

this process would cause Ms. Folz pain, *Petition* at 9a. How can this be said to be an "irrational" decision?

Despite the clear statements in *Vacco* and *Glucksberg*, Petitioner does not even attempt to argue that the standard adopted by the Wisconsin Supreme Court is irrational or unrelated to a valid state purpose. Wisconsin has chosen to adopt a bright line test in the cases of people who have neither executed advance directives nor provided convincing evidence of their desires. It is not possible to find this an irrational position. In light of the recent statements in *Vacco* and *Glucksberg*, the Wisconsin Supreme Court's decision implicates no Constitutional violation because it is rationally related to a legitimate state interest. That is all the State must show, and that burden is easily met here. There is simply no basis to review the decision of the Wisconsin Supreme Court.

III

NO EQUAL PROTECTION CLAIM WAS EVER RAISED IN STATE COURT AND, IN ANY EVENT, THERE IS NO COLORABLE EQUAL PROTECTION ISSUE PRESENTED BY THE DECISION OF THE WISCONSIN SUPREME COURT.

A. No Equal Protection Claim Was Ever Raised in the State Courts of Wisconsin.

This issue is raised in this Court for the first time. No Equal Protection claim was ever presented to either the state probate court or the Wisconsin Supreme Court. It should not be heard here in the first instance.

B. The Procedures Established by the Wisconsin Supreme Court Do Not Violate the Equal Protection Clause of the Constitution.

The decision of the Wisconsin Supreme Court does not violate the Equal Protection Clause. According to the Equal Protection Clause of the Fourteenth Amendment, no state shall "deny to any person within its jurisdiction the equal protection of the laws." Petitioner's assertion that the Wisconsin Supreme Court "has ruled that all incompetent persons who are not in a persistent vegetative state simply lose their constitutionally protected liberty interests in making choices about their medical treatment" (*Petition* at 18), is simply wrong. Ms. Folz retains the same Constitutional rights as all citizens.

First, the decision in this case is not about "medical treatment." It is about causing the death of the disabled person by starvation. Under Wisconsin law the guardian can make the full range of medical decisions regarding the ward, so long as those decisions do not cause the ward's death. The Wisconsin Supreme Court was pellucid in distinguishing most forms of treatment from a decision which will result in the death of a disabled person.

Secondly, a competent person only has the "right" to withdraw treatment if he or she expresses that wish. Here Ms. Folz has expressed no such wish. The Equal Protection Clause "embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly," *Vacco*, 117 S.Ct. at 2297. If Ms. Folz had executed an advance directive or even made a definite statement to someone regarding her wishes, she would be in the same circumstances as a competent person who is able to

express his or her wishes. Now, however, Ms. Folz is in no different position than a competent person who never expresses a preference or desire to withhold or withdraw treatment. In neither case would a person who has expressed no preference be allowed to starve to death under the guise of "making choices about their medical treatment."

Thirdly, as this Court has recently reminded us: "[M]any [laws] affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law," *Vacco, id., quoting, Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 271-273 (1979). For example, Ms. Folz has the right to vote, to sit on juries, to run for public office, and the right to marry. However, due to her disability, Ms. Folz cannot exercise those rights, and they cannot be exercised by the Guardian. Hence, even if Ms. Folz was a lifelong Republican who never voted for anyone except a Republican in her entire life, Mrs. Spahn cannot now cast her sister's vote. Although Ms. Folz retains exactly the same rights as a non-disabled person, she has lost the ability to exercise some rights by virtue of her disability. If there is a constitutionally protected right to die, and this Court's decisions in *Glucksberg* and *Vacco* bode ill for such a claim, an incompetent cannot exercise that "right," any more than she can exercise her right to vote or marry.

Some rights are personal and cannot be exercised by a guardian. The Wisconsin Supreme Court has decided that one of those rights is the right to withdraw nutrition which will cause the person's painful death. The distinction between incompetent persons who have not, and

cannot, express their wishes, and competent people who can currently express their desires is rationally related to a legitimate state interest and thus meets the Equal Protection test established by this Court in *Vacco*. Wisconsin has a legitimate interest in protecting its citizens from pain and in preserving human life.

The Wisconsin Supreme Court carefully and rationally considered when a guardian cannot exercise rights for the ward which could be exercised by a competent adult. In *In re Guardianship of Eberhardy*, 102 Wis.2d 539, 572, 307 N.W.2d 881 (1981) the Court rejected the request of the parent/guardian of a mentally retarded woman to have the woman sterilized. The Court said:

> While the Constitution would generally mandate a free choice for sui juris adults, a free choice is an empty option for those who cannot exercise it. Moreover, it is by no means certain who should speak for the best interests of the retarded, and those who purport to may have conflicting interests which may well skew the decisions of even the best intentioned. Those who normally would speak for the incompetent parents, guardians, or even social workers may in actuality speak, consciously or unconsciously, in their own interests: diminished worry, convenience, a wish to be relieved of responsibility for close supervision, or frustration at their inability to deal with a most difficult problem. These very considerations may be, indeed, in the interests of the incompetent, but are not necessarily so.

In the instant case, the Wisconsin Supreme Court relied on this language in *Eberhardy* to reject the Guardian's application to cause the death of the disabled person, *see*

Petitioner's Appendix at 8a. This is a rational and reasoned differentiation which passes Equal Protection scrutiny under the test adopted in *Vacco*.

Finally, the Wisconsin Supreme Court found as a matter of state law that "the competent and incompetent person have exactly the same rights," *Appendix*, at 9a. Justice Steinmetz stated:

> Even a competent person cannot order "the withholding or withdrawal of any medication, life-sustaining procedure or feeding tube" if "the withholding or withdrawal will cause the declarant pain or reduce the declarant's comfort" unless the pain or discomfort can be alleviated through further medical means. Wis. Stat. § 154.03(1). *See also* Wis. Stat. § 155.20(1). In the case where withdrawal of life-sustaining medical treatment, including nutrition or hydration, will cause pain or discomfort, then, the competent and incompetent person have exactly the same rights.

Appendix, 9a.

Petitioner wants this Court to address broad Constitutional issues and ignore the specific facts of this case. Those facts are that Ms. Folz has never expressed any desire to have her life terminated in the manner desired by the Guardian, and here – on these facts – the Guardian's proposed action will not only result in Ms. Folz's death, it will cause suffering and discomfort, when none now exists.

While Respondent assumes that the Petitioner is acting in "good faith," this will not be true in every case, and other guardians will have conflicts even when they

are acting in "good faith." Some guardians will have a financial stake in the ward's death, others will be sorely inconvenienced by the lingering illness of a loved one, while for many watching a parent, child, or sibling slowly deteriorate will simply be too emotionally draining. Medical providers and doctors have financial concerns about the cost of and payment for medical care or even the professional frustration of not being able to "cure" a chronically ill patient. In such cases, even a person trying hard to make a good faith decision in the ward's interest can be influenced by these personal concerns, whether they be motivated by greed, personal reputation, or compassion.

The Wisconsin Court decided to retain a bright line whereby withdrawal of nutrition and hydration would be forbidden except when: (1) the disabled person had executed an advance directive or had clearly expressed her wishes on the matter; or (2) the person was in a persistent vegetative state. Unless one of these conditions is met, the guardian cannot cause the death of the ward by withdrawal of nutrition or hydration. It is simply not possible to find that the Wisconsin Supreme Court's decision in this case was other than rationally related to a legitimate state interest.

C. Allowing Guardians to Cause the Death of Their Wards, When the Ward Has Never Expressed a Wish to Die under Such Circumstances, Raises Very Substantial Equal Protection and Due Process Problems.

The Petitioner's position here is that a guardian for a disabled person, whether child or adult, should be able to

cause the death of the disabled person whenever the guardian makes a good faith, but subjective, determination that ward's life is no longer worth living and that it is in the disabled person's "best interest" to die. The Petitioner testified that although Ms. Folz was not capable of making the decision herself (T. 99), in 1988 the Petitioner decided to have the gastrostomy tube inserted because she felt that Ms. Folz could still "enjoy life." She could have fun (T. 100). She enjoyed being around children, and she enjoyed music (T. 99). Now, according to Mrs. Spahn's subjective impression, Ms. Folz has deteriorated to the extent that she does not *seem* to enjoy these things. Thus Petitioner has come to the conclusion that it is in Ms. Folz's "best interest" to die.

Allowing the surrogate decision-maker to decide when it is in the "best interests" of a disabled person to die, when that person has never expressed any desire to have life terminated under the circumstances, raises extraordinary concerns of Due Process and Equal Protection. The rule Petitioner seeks to impose would apply equally to profoundly developmentally disabled children, as well as persons with Alzheimer's disease and other forms of senile dementia. It would apply to people who are terminally ill, chronically, or, perhaps, simply profoundly disabled. Petitioner's position seriously jeopardizes the Constitutional rights of disabled persons.

This is not the case to take up these very serious legal and moral issues. The issue was not raised in state court, there is no evidence on this point in the record, and the Constitutional issue was never squarely decided by the State courts. Indeed, the state courts' decisions in this

case protected the rights of disabled people from premature and involuntary death authorized by surrogates. As important and profound as these issues are, this case is an inappropriate vehicle for consideration of the Equal Protection claims.

IV

THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR CONSIDERATION OF THE CONSTITUTIONAL ISSUES RAISED BY "END-OF-LIFE" POLICIES.

Clearly profound moral, legal, policy, and social issues are raised by end-of-life decision making. However, that is not a basis for granting certiorari in this case. The issues Petitioner wants this Court to decide were not litigated, preserved, or decided in the State Courts of Wisconsin. The facts in this case present an inappropriate vehicle for this Court's plenary consideration, particularly of the broad issues suggested by Petitioner.

There is no question but that this Court will be presented with many opportunities in the future to address every aspect of end-of-life decision-making in cases which have a better record, cases in which the Constitutional claims have been clearly raised, litigated and decided; and cases which present less problematic facts than this case.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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